Chua Choong Yin v Tan Boon Bak Trading Sdn Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–01–39 OF 1999

SHAIK DAUD, SITI NORMA YAAKOB AND HAIDAR JJCA

20 MAY 2002

Civil Procedure *— Appeal — Record of appeal — Filing of — Failures to comply with Practice Direction No 3 of 1992 and rr 18(4)(c) and 18(6) of the Rules of the Court of Appeal 1994 — Whether there was non-compliance with Practice Direction No 3 of 1992 — Whether there was a breach of rr 18(4)(c) and 18(6) of the Rules of the Court of Appeal 1994 — Practice Direction No 3 of 1992, Rules of the Court of Appeal 1994 rr 18(4)(c), 18(6)*

This appeal arose from the refusal of the High Court to grant an order of certiorari to the appellant to quash the award of the second respondent that upheld the appellant's dismissal from the employment of the first respondent to be for just cause or excuse. However before the court, the first respondent raised two preliminary issues namely non-compliance by the appellant with: (i) Practice Direction No 3 of 1992; and (ii) rr 18(4)(c) and 18(6) of the Rules of the Court of Appeal 1994 ('the Rules').

Held, dismissing the appeal:

(1) Practice Direction No 3 of 1992 was issued by the then Supreme Court to regulate the procedure of filing a chronology of events. Whilst the court appreciates that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason, they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail. The court had perused the chronology and found the allegations of non-compliance to be founded (see 149E, 150B, I).

(2) Despite such an order for which no appeal was lodged by the appellant, he had included in his appeal records the prohibited exhs CCY–16 and CCY–17 as well, a clear breach of r 18(4)(c) of the Rules. The first respondent pointed out to the appellant that the inclusion of exhs CCY–16 and CCY–17 in his index of documents was in defiance of the court order but despite being put on notice, the appellant insisted on including the offending two exhibits, and the fact of the first respondent's objection did not appear in the appeal records as required under r 18(6) of the Rules. The appellant's counsel took a simplistic approach to the objection by asking the court to ignore the offending exhibits and to rule against their use. The court considered that was not the proper approach to take, particularly when he had been put on notice that the inclusion of the two offending exhibits was contrary to the court order. The court also said that his refusal

to acknowledge the objection was a clear breach of r 18(6) of the Rules for which no explanation was forthcoming from him (see pp 150E–G, 151B–C). A

[Bahasa Malaysia summary

Rayuan ini berbangkit daripada keengganan Mahkamah Tinggi untuk memberikan satu perintah certiorari kepada perayu untuk membatalkan award responden kedua yang mengekalkan pemecatan perayu daripada bekerja dengan responden pertama berdasarkan sebab atau alasan yang adil. Walau bagaimanapun, di hadapan mahkamah, responden pertama telah membangkitkan dua isu awalan iaitu ketidakpatuhan oleh perayu dengan: (i) Arahan Amalan No 3 Tahun 1992; dan (ii) kk 18(4)(c) dan 18(6) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah tersebut'). B C

Diputuskan, menolak rayuan tersebut:

(1) Arahan Amalan No 3 Tahun 1992 telah dikeluarkan oleh Mahkamah Agong ketika itu untuk menyelaraskan prosedur pemfailan kronologi peristiwa-peristiwa. Sementara mahkamah menghargai bahawa arahan amalan tidak mempunyai kuasa undang-undang, ianya telah diwujudkan untuk tujuan yang tertentu, iaitu untuk menyelaraskan satu prosedur sistematik dan konsisten bagi mengawal pemfailan rekod-rekod rayuan. Atas alasan itu, ianya haruslah dipatuhi jika tidak kekecohan dan ketidakpastian dalam pemfailan rekod-rekod rayuan akan berlaku. Mahkamah telah meneliti kronologi dan mendapati wujud dakwaan-dakwaan ketidakpatuhan (lihat ms 149E, 150B, I). D E F

(2) Meskipun terdapatnya perintah sedemikian di mana tiada rayuan telah dibuat oleh perayu, beliau telah memasukkan juga dalam rekod-rekod rayuannya ekshibit-ekshibit CCY–16 dan CCY–17 yang dilarang tersebut, yang merupakan satu pelanggaran nyata k 18(4)(c) Kaedah tersebut. Responden pertama menyatakan kepada perayu bahawa kemasukan ekshibit-ekshibit CCY–16 dan CCY–17 dalam indeks dokumen-dokumen beliau adalah bertentangan dengan perintah mahkamah tetapi meskipun telah diberikan notis sedemikian, perayu mendesak untuk memasukkan kedua-dua ekshibit yang menyalahi undang-undang itu, dan hakikat bahawa bantahan responden pertama tidak terdapat dalam rekod-rekod rayuan sepertimana yang diperlukan di bawah k 18(6) Kaedah tersebut. Peguam perayu mengambil pendekatan yang mudah terhadap bantahan tersebut dengan memohon kepada mahkamah untuk tidak menghiraukan ekshibit-ekshibit yang menyalahi undang-undang tersebut dan untuk melarang penggunaan ekshibit-ekshibit tersebut. Mahkamah mempertimbangkan bahawa itu bukan pendekatan yang betul untuk diambil, terutamanya apabila beliau telah G H I

diberikan notis bahawa kemasukan kedua-dua ekshibit yang menyalahi undang-undang tersebut adalah bertentangan dengan perintah mahkamah. Mahkamah juga menyatakan bahawa keengganan beliau untuk mengambil perhatian terhadap bantahan tersebut adalah satu pelanggaran yang jelas k 18(6) Kaedah tersebut di mana tidak terdapat sebarang penjelasan daripada beliau (lihat ms 150E–G, 151B–C.]

Notes

For cases on record of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1126–1168.

Cases referred to

Ling Siok Seng v Ting Sieh Chung [1998] 4 MLJ 65 (refd)
Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 MLJ 54 (refd)

Legislation referred to

Rules of the Court Appeal 1994 r 18(4)(c), (6), (10)
Rules of the High Court 1980 O 53, O 55 r 1(2), Form 9

Appeal from: Notice of Motion No R8–25–83 of 1991 (High Court, Kuala Lumpur)

Kuppusamy (*Tony Dhana* with him) *(Tony Dhana & Co)* for the appellant.
TJ Su (*PY Au Yong* with him) *(Cheah Teh & Su)* for the first respondent.

Siti Norma Yaakob JCA (delivering the judgement of the court): This appeal arose from the refusal of the High Court to grant an order of certiorari to the appellant to quash the award of the second respondent that upheld the appellant's dismissal from the employment of the first respondent to be for just cause or excuse. However before us, the first respondent raised two preliminary issues namely non-compliance by the appellant with:

(i) Practice Direction No 3 of 1992; and
(ii) Rules 18(4)(c) and (6) of the Rules of the Court of Appeal 1994 ('the Rules').

We had agreed with the submissions of Mr TJ Su, counsel for the first respondent and upheld the preliminary objections but to appreciate them, we need to go back and trace all the proceedings that were commenced by the appellant in the courts below.

In 1987, following a domestic enquiry held by the first respondent on 4 June of that year, the appellant was informed by letter bearing the same

date, that he had been dismissed from his employment as a credit control officer with the first respondent on three founded charges of: A

(i) persistently contravening credit control procedures and instructions;

(ii) acting without authority by instructing Messrs CS Tang & Co, a firm of solicitors, to cease legal action against a debtor of the first respondent; and B

(iii) making a false mileage claim based on a rate that he was not entitled to.

In disputing his dismissal, the appellant proceeded to make representations to the industrial relations office which referred the matter to the second respondent and on 31 October 1990, by its Award No 291 of 1990, the second respondent upheld the dismissal and confirmed that it was for just cause or excuse. C

Dissatisfied, the appellant filed a judicial review action in the High Court in Originating Motion No R8–25–129–90 ('the first action') and obtained leave ex parte to apply for an order for certiorari to quash the award of the second respondent. D

On 13 June 1991, the first action was dismissed with costs on the preliminary objection that the appellant's statement pursuant to O 55 r 1(2) of the Rules of the High Court 1980 did not state the relief sought by him.

The appellant did not appeal against this order but instead filed a fresh action, Originating Motion No R8–25–83–91 ('the second action') and by a notice of motion dated 20 June 1991, the appellant prayed for an extension of time to apply once again for leave to apply for an order for certiorari and for such leave itself. E

The application for extension of time was granted on 13 January 1994, as well as leave to apply for an order of certiorari but costs was ordered against the appellant in favor of the first respondent. F

The first respondent pursued the matter further to the then Supreme Court but its appeal was dismissed with no order as to costs on 19 September 1995.

Back in the High Court, the second action was heard on 25 September 1996, when the first respondent objected to the admissibility of two further affidavits filed by the appellant without leave of court. The court allowed the appellant to withdraw the two further affidavits with liberty to file for leave to file further affidavits. The appellant did just that by way of a notice of motion dated 21 October 1996, for leave to file a further affidavit and to use certain exhibits therein during the hearing of the second action. G H

The notice of motion was struck off with costs on 28 April 1997, as counsel for the appellant failed to appear at the hearing. The appellant then applied to reinstate the notice of motion and this was granted on 10 June 1997, and costs of RM500 was ordered to be paid to the first respondent.

At the hearing of the reinstated notice of motion on 17 September 1997, an order was made allowing the appellant to use three exhibits identified as CCY–18 (including CCY–18A, CCY–18B and CCY–18C), I

CCY–19 and CCY–20 to be used at the hearing of the second action which was fixed for 7 January 1999, with directions that the parties file their respective written submissions and bundle of authorities into court one month before the hearing date. The first respondent complied with the directions but the appellant only did so well after the one month's period set by the court order.

The first respondent's written submissions raised two preliminary objections based on the failure of the appellant to:

(1) comply with O 53 and Form 9 of the Rules of the High Court 1980; and

(2) state with sufficient particularity in the intitulement of the second action the statute for which the application for an order of certiorari is sought.

This prompted the appellant to apply to amend the substantive motion in the second action and this was heard together with the second action on 7 January 1999, where the application to amend was granted with costs to the first respondent.

The second action as amended was finally heard on 9 April 1999, when the High Court dismissed it with costs. Hence, the appellant's present appeal before us.

Having outlined the tedious manner in which proceedings in this appeal commenced and was allowed to continue, we now turn to the first of the preliminary objections raised by the first respondent, namely the appellant's failure to comply with Practice Direction No 3 of 1992.

That Practice Direction which was issued by the then Supreme Court to regulate the procedure of filing a chronology of events to that court has, subject to some modifications, been adopted by this court to apply mutatis mutandis from 24 June 1995 as Practice Direction No 1 of 1995. Under that Practice Direction, an appellant or applicant has to file seven copies of the chronology of events which had taken place from the time the action or application was filed in the High Court to the date the records of Appeal are filed with the registrar of this court. The chronology of events should also contain the skeletal grounds of appeal as prescribed by 'Annexure A' to the aforesaid Practice Direction.

Objections on non-compliance fell into the following categories:

(1) no skeletal grounds of appeal have been stated by the appellant in his chronology;

(2) only events which were favorable to him were disclosed but not those which put him in a bad light; and

(3) a detailed chronology of events which occurred from 21 January 1997 to 9 April 1999 has also been omitted.

We had perused the chronology and found the allegations of non-compliance to be founded.

In rebuttal, Mr Tony Dhana, counsel for the appellant, maintained that the appellant is only bound by r 18(10) of the Rules, which requires that only a chronology of events need be submitted together with the record of appeal and no mention is made that a skeletal ground of appeal has to be stated in the chronology as well. As such, the appellant has done all that he is required to do under the Rules.

Whilst we appreciate that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail. See the cases of *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54 and *Ling Siok Seng v Ting Sieh Chung* [1998] 4 MLJ 65.

Whilst the appellant attempted to give an explanation as to his failure to state the skeletal ground of appeal in his chronology, no submission was made why he had omitted to mention events not favorable to him, particularly the events to show why the substantive motion in the second action took more than two and a half years from the date of its filing to be heard.

The second objection raised by the first respondent relates to the appellant's utter disregard to the court order dated 17 September 1997, when filing his memorandum of appeal. Under that court order, the appellant was only allowed to use three exhibits, CCY–18 to CCY–20 (including exhs CCY–18A, CCY–18B and CCY–18C), during the hearing of substantive motion in the second action but not exhs CCY–16 and CCY–17. Despite such an order for which no appeal was lodged by the appellant, he had included in his appeal records the prohibited exhs CCY–16 and CCY–17 as well, a clear breach of r 18(4)(c) of the Rules. By a letter dated 21 June 1999, solicitors for the first respondent pointed out to the appellant that the inclusion of exhs CCY–16 and CCY–17 in his index of documents was in defiance of the court order but despite being put on notice, the appellant insisted on including the offending two exhibits and the fact of the first respondent's objection does not appear in the appeal records as required under r 18(6) of the Rules.

Rule 18(4) of the Rules requires the appellant to attach to his memorandum of appeal, copies of the proceedings in the High Court including:

> (c) copies of all affidavits read and all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to r 101 if such documents are not in the national language, copies of certified translation thereof;

Rule 18(6) of the Rules states that a draft index of documents to be included in the appeal record shall be sent by the appellant's solicitors to the solicitors of the first respondent to enable the latter to object to the inclusion or exclusion of any document. However, the first respondent's objection lies with the following text of that particular sub-rule which reads as follows:

> Where in the course of preparation of the record, one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on it being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

Mr Tony Dhana took a simplistic approach to the objection by asking us to ignore the offending exhibits and to rule against their use. We considered that was not the proper approach to take, particularly when he had been put on notice that the inclusion of the two offending exhibits was contrary to the court order. We also say that his refusal to acknowledge the objection was a clear breach of r 18(6) of the Rules for which no explanation was forthcoming from him.

Based on the two preliminary objections for which we entirely endorse, we had concluded that this appeal was not properly brought before us and on that finding, we had dismissed it with costs and ordered that the deposit be paid to the first respondent to account of its taxed costs.

Appeal dismissed.

Reported by Peter Ling